United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: September 20, 1996

TO : Peter W. Hirsch, Regional Director
Region 4

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Liberty Cab & Limousine Co., and Airport Shuttle Service, Inc.
Case 4-CA-24689

530-4825-5000
530-4850-5000
530-4850-9100
530-8090-0167

This case was submitted for advice as to whether, when one of two joint employers files for bankruptcy and the court approves reductions for that employer from contractually established wages and fringe benefits, the other joint employer violates Section 8(a)(5) by failing to maintain those contractual terms and conditions of employment without bargaining with the Union.[1]

FACTS

Liberty Cab & Limousine Co. (Liberty) is a Pennsylvania corporation engaged in operating an airport shuttle service, under the name SuperShuttle, which takes passengers from Philadelphia area hotels to the airport. Liberty obtained Aleph Management System's (Aleph) permission to use the SuperShuttle name, as Aleph holds the "tri-state development license as a franchisee of SuperShuttle Franchise Corp.," an Arizona corporation. Brian Somerman and Carol Budilov own Aleph.

Teamsters Local 115 (the Union) represents Liberty's airport shuttle service drivers. Under the Union's collective-bargaining agreement with Liberty, the airport shuttle service drivers received 36% of revenues, and were guaranteed a minimum hourly rate. This agreement expired in August 1996.

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[1] The Region has concluded that the 10(j) relief requested by the Union is unwarranted at this time.

In January 1995, Aleph purchased 100% of Airport Shuttle Service, Inc.'s (ASSI) stock.[2] ASSI is a Delaware corporation engaged in operating airport shuttle services from the Wilmington, Delaware area to the Philadelphia Airport, and in leasing drivers to other non-shuttle ground transportation companies. Under the Union's collective-bargaining agreement with ASSI, which was to expire in April 1997, the Wilmington drivers received 39% of revenues, but were not guaranteed a minimum hourly wage. Aleph owner Somerman informed ASSI's drivers that it was now managing ASSI, observed the terms of ASSI's contract with the Union, and selected ASSI's general manager.

Philadelphia International Airport announced that effective March 31, 1995, it would no longer allow ASSI, Liberty and other ground transportation service companies to operate counter concessions within the terminals at the Airport. ASSI and Liberty feared this change would decrease their revenues and, as a result, engaged in merger negotiations with one another.

On May 27, 1995, Somerman posted a notice in the ASSI Wilmington facility which advised "SuperShuttle" employees that "SuperShuttle operating from Philadelphia International Airport will combine all of [its] dispatch and reservation facilities into our [Philadelphia] Facility"; that the Delaware operation would not be shut down and the employees would not be terminated, as rumored; and that "our management" was meeting with the Union. On May 30, Somerman met with the Union on behalf of "SuperShuttle/Airport Shuttle/Liberty Limo," and the parties discussed a new contract.

By July 6, 1995, the parties had reached and executed a new collective-bargaining agreement. The contract recites that it is between "[Liberty] and [ASSI], both doing business as SUPERSHUTTLE," and the Union, and is effective until July 5, 1997. The ASSI employees were placed on Liberty's payroll and began to receive SuperShuttle checks from the same bank account used to pay Liberty employees. The Region has determined that Liberty and ASSI are joint employers of the shuttle service

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[2] In January 1996, ASSI's name was changed to SuperShuttle of Philadelphia, Inc.

drivers,[3] who currently are contractually entitled to 31% of revenues with a guaranteed minimum hourly wage.

In February 1996, Liberty filed for reorganization under Chapter 11 of the Bankruptcy Act. The bankruptcy court granted Liberty interim relief in the form of an hourly wage reduction from the $6.92 contractually guaranteed rate to $4.50 per hour. Liberty was also allowed to adopt a less expensive health insurance plan. At the time Liberty filed for bankruptcy, its largest unsecured creditor was ASSI, which was owed approximately $1.3 million. ASSI has not filed under Chapter 11, and essentially contends that it is not a joint employer of the drivers, all of whom are on Liberty's payroll.

ACTION

We conclude, in agreement with the Region, that complaint should issue, absent settlement, alleging that ASSI, one of two joint employers, violated Section 8(a)(5) of the Act by making changes in contractual terms and conditions of employment without bargaining with the Union.

An employer is obligated to bargain with the exclusive bargaining representative of unit employees and no other.[4] As to a bankrupt employer's obligation to abide by contractual terms and conditions of employment, the Board has concluded that Section 1113, added to the Bankruptcy Code by the Bankruptcy Amendments of 1984, overruled that aspect of Bildisco[5] which held that a collective bargaining

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[3] Whether an employer possesses sufficient indicia of control over employees who are employed by a separate employer is essentially a factual question, and the Board has found joint employer status where two or more separate business entities "share or codetermine those matters governing essential terms and conditions of employment." Laerco Transportation, 269 NLRB 324, 325 (1984), citing Boire v. Greyhound Corp., 376 U.S. 473 (1964), and NLRB v. Browning-Ferris Industries, 691 F.2d 1117 (3d Cir. 1982), enfg. 259 NLRB 148 (1981).

[4] Medo Photo Supply Corporation v. NLRB, 321 U.S. 678, 683-84 (1944).

[5] NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984).

agreement is not enforceable under Section 8(d) from the time the petition was filed until the employer formally assumed the contract. Thus, the amendments restored the Section 8(d) obligation of an employer in Chapter 11 to abide by the terms of a collective-bargaining agreement until rejection of the contract is authorized by a bankruptcy court. Phoenix Co., 274 NLRB 995, n.3 (1985). Section 1113(e) of the Bankruptcy Code provides:

> If during a period when the collective-bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by the collective bargaining agreement....

And, Section 1113(f) of the Bankruptcy Code states:

> No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provision of a collective bargaining agreement prior to compliance with the provisions of this section.

The Bankruptcy Code then provides

> that the debtor-in-possession shall make application for such rejection only after proposing necessary modifications to the authorized representative of the employees, providing it with the relevant information needed to evaluate the proposal. If a proposal that meets the statutory requirements is rejected by the authorized representative "without a good cause," a hearing will be scheduled on such application.[6]

In Market King, the Board affirmed an ALJ's conclusion that William Chu and Market King, Inc., were alter egos. It further held that an employer not involved in a bankruptcy proceeding violates Section 8(a)(5) and (1) by

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[6] Accurate Die Casting Co., 292 NLRB 982, 987 (1989).

repudiating a contract it had agreed to assume although its alter ego's liability terminated upon filing for bankruptcy.[7] There, Chu filed a bankruptcy petition on behalf of Market King, but there was no evidence that Chu had filed a bankruptcy petition on his own behalf, or that he had been brought within the jurisdiction of the bankruptcy proceeding involving Market King. Consequently, the Board affirmed the ALJ's conclusion that Chu, as well as Market King, violated Section 8(a)(5) and (1) by repudiating the Market King-union contract he agreed to assume, but terminated the ALJ's remedy with respect to Market King as of the date Chu filed the bankruptcy petition.[8]

In the instant case, unlike in Market King, ASSI and Liberty are joint employers. A joint employer situation, like an alter ego situation, entails parties' sharing or codetermining terms and conditions of employment but, unlike alter egos, joint employers remain separate legal entities. However, we believe that this distinction renders the Market King rationale applicable even more forcefully in a joint employer context. Thus, an employer like Chu was the same legal entity as, and by definition bound to a union's contract with, its alter ego Market King but still was not found to share Market King's bankruptcy privilege for relief from that contract. *A fortiori*, an employer which is a *separate* legal entity from its bankrupt joint employer should not share its joint employer's privilege for Chapter 11 contractual relief.

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[7] Market King, Inc., 282 NLRB 876, 877 (1987), citing Edward Cooper Painting, 273 NLRB 1870 fn. 8 (1985) (where an employer filed a bankruptcy petition after repudiating its collective-bargaining agreement, the Board found that Bildisco, *supra*, precluded an order requiring the employer to comply with the contract after the date of the filing of the bankruptcy petition).

[8] The Board further concluded that liability would extend to the contract's termination date if it were determined during a compliance proceeding that the bankruptcy court did not approve rejection of the contract. Market King, *supra* at 876-77, nn.5 & 6.

Here, Liberty sought and obtained authorization from the Bankruptcy Court to implement interim changes in certain terms of the collective-bargaining agreement, and there is no contention that Liberty's implementation of those changes was unlawful. However, ASSI neither sought nor obtained authorization to implement interim changes in those economic terms of the collective-bargaining agreement to which it is a party. Thus, as with respondent Chu in Market King, ASSI did not file its own bankruptcy petition, was not brought within the jurisdiction of the bankruptcy proceeding involving Liberty, and thereby could not, and did not, seek or obtain permission from the Bankruptcy Court prior to making unilateral changes in contractual wage and insurance terms. Hence, as in Market King, we conclude that ASSI did not share Liberty's privilege to make, and is liable for, changes in contractual terms and conditions of employment without bargaining with the Union.

Accordingly, we conclude that complaint should issue, absent settlement, alleging that ASSI violated Section 8(a)(5) of the Act.

B.J.K.